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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re Marriage of VICTOR and JINNI JOY O'NEILL HERNANDEZ.	B208173 (Los Angeles County Super. Ct. No. BD 393105)
VICTOR HUGO HERNANDEZ, Appellant, v. JINNI JOY O'NEILL HERNANDEZ, Respondent.	

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael P. Linfield, Judge. Affirmed with directions.

Lipton & Margolin, Hugh A. Lipton; Levin & Margolin and Lionel P. Levin for Appellant.

Law Offices of Ariel Leichter-Maroko and Ariel Leichter-Maroko for Respondent.

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Respondent Jinni Joy O'Neill Hernandez and appellant Victor Hugo Hernandez were married in 1992, had one child (Liam Andres) in 1999, separated in 2003 and divorced per a judgment entered on August 23, 2005. Victor[1] was required under the judgment to pay $7,500/month spousal support and $3,000/month child support for Liam. In November 2007, Victor moved to terminate spousal support. He appeals from the order denying his motion. We affirm.

PROCEDURAL HISTORY

Jinni and Victor, both represented by counsel, stipulated to the terms of the judgment of dissolution.

Although the record does not contain the documentation, it appears that about four months after the entry of judgment Victor moved to terminate spousal support; that motion was denied. Apparently, Victor brought this motion in propria persona. (At all other times, including the present, he was represented by counsel.) On November 27, 2006, Victor again moved to terminate spousal support. This motion was also denied, the court's order stating that Victor had not demonstrated a change in circumstances. The instant motion to terminate spousal support was filed on November 30, 2007.

In the current motion to terminate support, Victor sought an order terminating support as of August 28, 2008. In the alternative, Victor sought an order along the lines found in *In re Marriage of Richmond* (1980) 105 Cal.App.3d 352, 354 (*Richmond*). In that case, the trial court entered an order in which it announced that it would terminate spousal support and jurisdiction at a date three years in the future. The alternative Victor sought was what he calls "a *Richmond* review to occur in January of 2009." (Underscoring omitted.)

Victor's motion was also supported by the declaration of his counsel. This declaration stated that the judgment had contained the warning that was first enunciated in *In re Marriage of Gavron* (1988) 203 Cal.App.3d 705, 712 (*Gavron*). That is a warning by the trial court addressed to the supported spouse "that after an appropriate

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[1] We refer to the parties by their first names; we intend no disrespect thereby.

period of time the supported spouse was expected to become self-sufficient or face onerous legal and financial consequences." (*Ibid.*)

During the hearing on Victor's motion, the trial court ruled that there had been no *Gavron* warning. The court went on to refuse to give a *Gavron* warning. The court found that there had been no change in circumstances. The court stated: "Liam is a special needs child. At this stage in his life, I think that Mom's help with him is in his best interests. . . . [¶] . . . [¶] . . . Mom's work with him is important to his functioning -- his current functioning." The court denied the motion to terminate spousal support.

FACTS

1. Liam

Liam's mental health, and the amount of care he requires from Jinni, is one of the central issues between Victor and Jinni. We begin with the declaration of Laurance F. Johnson, M.D., a child psychiatrist, who sees Liam once every week. According to Dr. Johnson, from an early age Liam exhibited rage and aggressive behavior. Liam has physically attacked not only other children, but also his mother, his pediatrician and a teacher. At one point, Liam even threw a plastic toy at Dr. Johnson. Dr. Johnson started him on low doses of Trileptol and Resperdol, which brought about a significant reduction in the number and intensity of Liam's rages. Liam's improvement was not uniform, however, and there were periods when his violent conduct escalated to the point that school officials, Jinni and Dr. Johnson all became concerned over Liam's ability to control himself. One of the concerns was for the safety of a child that Jinni was expecting, a child fathered by someone other than Victor. As a result, Dr. Johnson increased the doses of Trileptol and Resperdol. In December 2007, when Dr. Johnson gave his declaration, Liam was doing very well in weekly outpatient therapy. Dr. Johnson's conclusion was that Liam filled "many criteria of childhood Bipolar disorder" but that he is not autistic. According to Dr. Johnson, Liam remains "a severely disturbed boy but one who has made great progress."

As far as the parents were concerned, Dr. Johnson thought that Victor "greatly minimized Liam's symptoms but has gradually learned to understand them well" and

Jinni has done an "excellent job in helping Liam with his numerous problems, including a high level of separation anxiety, some depressive thoughts, frequent grandiosity and excessive fascination with violence."

Victor's declaration submitted in support of his instant motion to terminate spousal support refers to a report prepared by Dr. Johnson in October 2007. In fact, this handwritten report is identical to his declaration filed in December 2007. According to Victor, Dr. Johnson's report "establishes that our son is not a special needs child." (Jinni states in her declaration that Liam is a special needs child.) Victor's declaration refers to good test scores compiled by Liam in third grade, which shows that Liam "is functioning at a high level." Victor's declaration does not address the multiple negative observations about Liam contained in Dr. Johnson's report and later declaration.

Jinni's declaration states that she gave birth to her second child in May 2007. Jinni states that Liam requires weekly visits with his social worker and Dr. Johnson. Liam is assisted by a full-time aide at school and he is closely monitored by school authorities. While Liam is making forward strides, he requires a great deal of care and attention. According to Jinni, Victor initially objected to Dr. Johnson seeing and treating Liam and he also objected to the medication prescribed by Dr. Johnson. Jinni states she moved from Pasadena to Simi Valley so that Liam "could attend an excellent school." She states she takes Liam to all of his appointments and that she and Liam have "worked hard to get his disorders and conditions under some control." Jinni claims that when Liam is on his regular weekly visits with Victor, he does not give Liam his medications because Victor does not think Liam needs them.

2. Jinni's Education and Work History

Jinni has a bachelor's degree in Broadcast Journalism (1995) and has a teaching credential. She worked part time as a teacher for six months and full time for two and a half years. She has not worked since Liam was born. She intends to seek retraining before entering the job market "as soon as my children's schedules allow." She states that she has found it "impossible at this time to train, educate or re-enter the job market."

Victor states in his declaration that since the divorce, Jinni "continues to do nothing to contribute to her own support" and that she has "done nothing to prepare herself to re-enter the job market." Victor states Jinni has made no effort to become self-sufficient and that Jinni's "lifestyle choices are hers to make. They should not, however, cause me to subsidize her decision to have another child, further delaying her re-entry into the workplace."

DISCUSSION

1. The Trial Court Was Correct in Concluding That No Gavron *Warning Had Been Given*

Victor contends that the trial court erred in ruling that there was no *Gavron* warning.

The Judicial Council form that is used in dissolution judgments (not the stipulated judgment itself) contains the following paragraph added to section 4.m., which deals with spousal support: "NOTICE: It is the goal of this state that each party will make reasonable good faith efforts to become self-supporting as provided for in Family Code section 4320. The failure to make reasonable good faith efforts may be one of the factors considered by the court as a basis for modifying or terminating spousal or partner support."

The printed notice on the Judicial Council form is not a *Gavron* warning. The *Gavron* warning is a statement, by the court, that after an appropriate period of time the supported spouse is expected to become self-sufficient or face onerous legal and financial consequences. In other words, it is an announcement by the court that onerous legal and financial consequences *will* result if the supported spouse does not become self-supporting. The notice under section 4.m on the Judicial Council form, on the other hand, states that the failure to make a reasonable good faith effort to become self-supporting *may* be one of the "factors" in modifying or terminating spousal support. It is evident that courts will not and cannot make an order in every dissolution case that the supported spouse *must* become self-supporting or face onerous consequences. The notice

under section 4.m is a statement of policy and not the announcement of a decision that will govern a particular case.

In addition, and perhaps even more importantly, this notice on a printed form is not a substitute for a judge or bench officer. It is obvious that the *Gavron* warning is intended to be given by the judge or bench officer after the facts of the *particular* case have been studied and weighed by the judge, prominently including facts about the age, education, training, responsibilities and perhaps even the health of the supported spouse. The *Gavron* warning is not boilerplate, as is evident from the decision itself.[2] And it certainly was not intended to become part of each and every judgment of dissolution.

Victor's argument that principles of contract interpretation set forth in Civil Code section 1638 require us to "understand" the printed notice in its "ordinary and popular sense" borders on the specious. As we have pointed out, the notice on the Judicial Council form is not a *Gavron* warning, in the first place, and there is therefore nothing to interpret. Moreover, whether or not a *Gavron* warning is to be given is decided in terms of the facts of each case, and not on the basis of a preprinted notice on a Judicial Council form, whatever that notice says. It follows from this that there is no merit to Victor's further contention that there is no substantial evidence that supports the trial court's ruling that there was no *Gavron* warning. No evidence is required to support that ruling, which was one of law, not of fact, and which was eminently correct.

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[2] "Inherent in the concept that the supported spouse's failure to at least make good-faith efforts to become self-sufficient can constitute a change in circumstances which could warrant a modification in spousal support is the premise that the supported spouse be made aware of the obligation to become self-supporting. It is particularly appropriate here that there should have been some reasonable advance warning that after an appropriate period of time the supported spouse was expected to become self-sufficient or face onerous legal and financial consequences." (*Gavron*, *supra*, 203 Cal.App.3d 705, 712.)

2. Spousal Support Could Not Be Modified Because There Was No Change In Circumstances

Victor contends that the trial court should have modified spousal support by issuing a *Richmond*[3] order. "A 'Richmond' order is one which sets spousal support for a fixed period based upon evidence that the supported spouse will be self-supporting by the end of the period." (*In re Marriage of Prietsch & Calhoun* (1987) 190 Cal.App.3d 645, 665.)

"Modification of spousal support, even if the prior amount is established by agreement, requires a material change of circumstances since the last order. [Citations.] Change of circumstances means a reduction or increase in the supporting spouse's ability to pay and/or an increase or decrease in the supported spouse's needs. [Citations.] It includes all factors affecting need and the ability to pay. [Citation.] Appellate review of orders modifying spousal support is governed by an abuse of discretion standard, and such an abuse occurs when a court modifies a support order without substantial evidence of a material change of circumstances. [Citations.]" (*In re Marriage of McCann* (1996) 41 Cal.App.4th 978, 982-983.)

Victor does not point to any change or changes in the circumstances. In fact, in the trial court counsel repeatedly argued that Jinni was required to make reasonable efforts to become self-supporting regardless of any change in circumstances, conceding that there was no change of circumstances in this case.

This is a flawed argument from a legal, as well as a practical perspective. The law is that spousal support will not be modified save upon a showing of changed circumstances. From a practical perspective, the evidence is that Jinni is a mother of two with her hands full, at least at this time. Judicial pronouncements about becoming self-supporting are pointless when Jinni's time and personal resources are spent on two small children, one of whom requires very special care and attention. This is the time for

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[3] *In re Marriage of Richmond, supra,* 105 Cal.App.3d 352. See text, *ante,* page 2.

Victor to support those efforts, at least monetarily. Victor, who earns in excess of $30,000 per month, is certainly in a position to do that.

Victor is not entitled to a *Richmond* order simply because he demands one. While he may have demanded such an order in the negotiations that led up to the stipulated judgment, it is now too late to make such a demand unsupported by any change in circumstances. We find it worthwhile to note that it is highly doubtful that, given Jinni's circumstances with Liam, not to speak of her new child, any court would have entered a *Richmond* order. The situation with Liam is simply too volatile to contemplate a fixed date by which Jinni would have to become self-supporting.

Victor contends that the trial court abused its discretion in not entering a *Richmond* order. Victor has it wrong. Given that there was no change in circumstances, the court would have abused its discretion if it had issued a *Richmond* order. (*In re Marriage of McCann, supra*, 41 Cal.App.4th at p. 983.)

Citing *In re Marriage of Prietsch & Calhoun, supra*, 190 Cal.App.3d 645, 666,[4] Victor appears to contend that he is entitled to a *Richmond* order as a matter of law, without regard to the lack of a change in circumstances. There are four substantial flaws in this contention.

First, there is no authority for this proposition. Second. It is in error as the parties are obviously free to agree, as they did in this case, to the absence of a *Richmond* order. Third. We do not see how, given the facts of this case, any court could issue a *Richmond* order. Fourth. With deference to the appellate court in *In re Marriage of Prietsch & Calhoun,* the case before us presents a set of circumstances not envisaged by that court. It is therefore very doubtful that, as far as the case before us is concerned, the cited

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[4] "We believe that a 'Richmond' order is the most appropriate form of order for spousal support in all cases except (1) where spousal support is either not ordered, or is ordered for a fixed term of short duration, (2) in the most lengthy marriages where the circumstances justify truly 'permanent' spousal support, or (3) where the supported spouse does not possess the capacity to become self-sufficient." (*In re Marriage of Prietsch & Calhoun, supra*, 190 Cal.App.3d at p. 666.)

dictum from *In re Marriage of Prietsch & Calhoun* (see fn. 4, *ante*) is of persuasive weight.

3. The Motion for Sanctions

Jinni has filed a motion in this court, following the completion of briefing, for sanctions on the ground that Victor's appeal is frivolous.

> "The California cases discussing frivolous appeals provide a starting point for the development of a definition of frivolous. Those cases apply standards that fall into two general categories: subjective and objective. [Citation.] The subjective standard looks to the motives of the appellant and his or her counsel. . . . [¶] The objective standard looks at the merits of the appeal from a reasonable person's perspective. . . . [¶] . . . [¶] Both strands of this definition are relevant to the determination that an appeal is frivolous. An appeal taken for an improper motive represents a time-consuming and disruptive use of the judicial process. Similarly, an appeal taken despite the fact that no reasonable attorney could have thought it meritorious ties up judicial resources and diverts attention from the already burdensome volume of work at the appellate courts. Thus, an appeal should be held to be frivolous only when it is prosecuted for an improper motive - to harass the respondent or delay the effect of an adverse judgment -- or when it indisputably has no merit -- when any reasonable attorney would agree that the appeal is totally and completely without merit. [Citation.]" (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 649-650.)

A circumstance that casts an adverse light on Victor's motive in prosecuting this appeal is the fact that he filed three motions to modify spousal support within a period of three years, the first only four months after judgment was entered. It appears that none of these motions relied on changed circumstances. While one such motion is understandable, especially if brought in propria persona, three within two years speaks ill of Victor's motives. Closely paced, identical motions that have no merit constitute harassment.

In response to our announcement that we were considering imposing sanctions for taking a frivolous appeal, Victor's counsel stated that there are many in the legal profession who believe that paragraph 4.m on the Judicial Council form constitutes a *Gavron* warning.

We do not think that it is a close question whether paragraph 4.m is a *Gavron* warning. In our opinion, it is patent, for the reasons we have already discussed, that paragraph 4.m is not a *Gavron* warning. We are prepared, however, to give counsel the benefit of the doubt and conclude, at least in this appeal, that counsel prosecuted this appeal with the subjective good faith that the matter of the *Gavron* warning was a close question that required resolution. We are nonetheless concerned over the fact that there were repetitive motions for modification of spousal support brought over a relatively short period of time without even a pretense of changed circumstances to justify the motions.

Although we will not award sanctions, there is every reason for Victor to bear the entire expense of these unsuccessful proceedings. We conclude that Jinni is entitled to be reimbursed for the attorney fees incurred in this appeal. We remand with directions to determine the amount of attorney fees incurred by Jinni in this appeal.

DISPOSITION

The judgment is affirmed and remanded with directions for the court to determine the amount of attorney fees incurred by respondent in this appeal. Respondent is also to recover her costs on appeal.

FLIER, Acting P. J.

We concur:

BIGELOW, J.

MOHR, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.